

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
February 14, 2006 Session

**STATE OF TENNESSEE v. GARY DALE TIDWELL**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 2003-C-1656 J. Randall Wyatt, Jr., Judge**

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**No. M2005-00172-CCA-R3-CD - Filed April 28, 2006**

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The defendant, Gary Dale Tidwell, was convicted of second degree murder. See Tenn. Code. Ann. § 39-13-210 (2003). The trial court sentenced the defendant as a Range I, violent offender to seventeen years at one hundred percent. See Tenn. Code Ann. § 40-35-501(i)(2)(B)(2005). In this appeal, the defendant asserts (1) that the trial court erred by denying his motion to suppress statements he made to police; (2) that the trial court erred by allowing evidence of the defendant's other crimes, wrongs, or acts in regard to his relationship with the victim's sister; and (3) that the evidence was insufficient to support his conviction for second degree murder. The judgment of the trial court is affirmed.

**Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed**

GARY R. WADE, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Ross Alderman, Public Defender, and Johnathan F. Wing, Assistant Public Defender (at trial), and Jeffrey A. DeVasher, Assistant Public Defender (on appeal), for the appellant, Gary Dale Tidwell.

Paul G. Summers, Attorney General & Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Jim Todd and Sara Davis, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

On March 21, 2002, the defendant's employer telephoned his sister, Juanita Simpson, to inform her that the defendant had failed to report for work the previous two days. Ms. Simpson went to his residence, smelled a foul odor, and found the body of the victim, Eric Parham. She immediately called for an ambulance and police. Officer David J. Lane of the Metropolitan Nashville Police Department, who was dispatched to the scene, found the victim lying in a bedroom doorway. There was blood on the kitchen floor. The body had begun to decompose, so the officer secured the scene and waited for medical personnel and homicide detectives.

Officers began to look for the defendant, who later in the evening reported to the police department. While there, the defendant gave a statement to homicide detectives admitting having shot the victim but claiming that he acted in self-defense.

At trial, Damita Harriston, the victim's sister, testified that the victim had been incarcerated in Ohio for approximately eight months in the late 1980s but had lived in Nashville for two years prior to his death. She stated that she had been romantically involved with the defendant in the early to mid-1990s and recalled that during that time, the defendant and victim were in frequent contact and had a good relationship. She stated that she did not see the defendant from the mid-1990s until meeting him at a car auction in November of 2002, when the defendant purchased a car for her son. Ms. Harriston testified that the defendant wanted to resume the relationship but she declined because of her pending divorce. She stated that her rejection of his advances angered the defendant and that on occasion, in retaliation, he would threaten to take away the car he had purchased for her son. According to Ms. Harriston, the defendant once falsely reported to the police that he had let her borrow the car and that she would not return it. She testified that when the police arrived at her residence at approximately 1:30 a.m., she informed them that the keys were in the car and that she had telephoned to authorize the defendant to take possession. She explained that the keys were in the car and that the defendant drove it away. Ms. Harriston stated that afterward, she and the defendant reached an agreement not to contact each other but the defendant continued to call her repeatedly on her cell phone. She also recalled an incident shortly before the victim's death when the defendant unexpectedly appeared at her office and refused to leave until she agreed to eat lunch with him. She testified that on the night before she was notified of the murder, she saw the defendant's cab pass by her residence on two occasions, stopping once in front of her house. It was her opinion that the defendant and the victim were "pretty good friends." She stated that the defendant had never exhibited any hostility toward the victim.

On cross-examination, Ms. Harriston confirmed that the victim had lived with her off and on for two years just before his death. She testified that he moved out a couple of weeks before his death and that she learned that the victim had moved in with the defendant only one week before his death. She acknowledged that from the point when she saw the defendant at the car auction until the victim's death, the defendant had not harmed or physically threatened her. She agreed that the defendant had never complained that the victim interfered with their relationship.

Juanita Simpson, the defendant's sister, testified that she was notified by his employer of his absence from work. She stated that when several telephone calls were not answered, she and two co-workers of the defendant went to his residence, smelled a foul odor, and saw the legs of someone lying in the entryway of a spare bedroom. She recalled that she immediately left the residence and called for an ambulance and the police. She described the defendant's residence, which was usually tidy, as a "wreck." Ms. Simpson contended that the defendant "was in a real good mood" when she had talked to him two days earlier but acknowledged having told the police upon finding the body that the defendant was upset the last time they communicated by telephone. She admitted telling the authorities that a noise had interrupted this conversation before the telephone died.

William Rucker, the victim's employer, testified that he had known the victim for about twenty years before his death and the defendant for about a year. He recalled that a week before the victim's death, he overheard the defendant tell the victim that "he should have killed that bitch [Damita Harriston] when he had a chance." Rucker remembered that the victim, while not appearing angry at the statement, cautioned the defendant not to hurt his sister, saying, "[Y]ou guys need to try to talk it out." He testified that when he also advised the defendant that his problems with the victim's sister were "not worth getting in trouble for," the defendant responded that he did not care if he went to jail. Rucker interpreted the statements of the defendant as just "shooting his mouth" and did not report the incident to the police. Rucker recalled that he and the victim ate lunch at the restaurant where the defendant worked the following week. While there, he witnessed the defendant repeat his threat that he should have killed the victim's sister. According to Rucker, he and the victim again cautioned the defendant but later that same day, when the defendant stopped by where Rucker and the victim were working, he made the threat a third time. Rucker described the victim as a "good guy" who was not violent and who he had never seen angry. He testified that he never knew the victim to carry a weapon but was aware that the defendant had carried a box cutter.

On cross-examination, Rucker confirmed that he had observed the defendant and the victim interact on three or four occasions without showing any hostility toward one another. He conceded that he never witnessed the defendant threaten the victim. While acknowledging that he was aware of the victim's conviction for voluntary manslaughter in Ohio, Rucker nevertheless testified that it was his opinion that the victim was a peaceful man.

Officer Christopher Brennan of the Metropolitan Nashville Police Department processed the crime scene. At trial, he identified several photographs and other items that were introduced into evidence by the state. He stated that there was no evidence of a forced entry and identified a discharged bullet that was found in the same room as the victim. Officer Brennan also identified pictures of the mattress, sheets, and pillow in that room, all of which were stained with blood. He removed a bullet and a tooth from underneath the bed but was unable to find shell casings. Some of the photographs he provided showed the trail of blood from the kitchen through the hallway to the bedroom where the body was found. Officer Brennan took samples of blood found throughout the residence but was unable to find a gun or box cutter at the scene. He did find a box cutter in the glove compartment of the defendant's car. The officer confirmed that he found no bullet holes in the mattress and that there was no damage to the inside of the mattress or the box spring.

Metropolitan Nashville Police Department Detective Joe Williams, the lead detective in the investigation, testified that he obtained a search warrant for the residence. He stated that he later received a phone call from the defendant's brother, who informed him that the defendant was already at the police station. When Detective Williams returned to the station, another detective, E. J. Bernard, was questioning the defendant. When he heard the defendant claim that the victim had a knife and was moving toward him as he fired the shot, Detective Williams stopped the interview and transferred the defendant to an interview room which was equipped with audio and video recording equipment.

The videotape, which was played for the jury, demonstrates that the defendant was informed of his Miranda rights and signed a form waiving those rights. Miranda v. Arizona, 384 U.S. 436, 471-75 (1966). A statement by Detective Bernard was preserved on the tape:

[W]e got a call through some people down here that you wanted to talk to us. We came down here and you and I met at about . . . 9:50. And you told me at that time who you were. And I asked you if you wanted to tell me what happened, . . . that we'd just left your trailer, and tell us what went on. At that time, you said that you were afraid, that the guy was gonna try to kill you, that he had a straight razor, and he had a box cutter . . . .

. . . .

. . . [Y]ou got into it, you started shooting, and you panicked. You went to the country, to your brother. You didn't know if he was dead or not.

The tape depicts the defendant's confirmation of the accuracy of the statement. The defendant also identified the victim as Eric Parham, who had been living with him. When asked why he was afraid the victim was going to hurt him, the defendant responded, "His conversations that he had earlier during the day and the activities that he was taking in during the two or three days that he was staying there." When asked to elaborate, the defendant requested an attorney.

At trial, Detective Williams indicated that the taped interview ended as soon as the defendant requested an attorney.<sup>1</sup> The detective further testified that he attended the autopsy of the victim and saw several projectiles recovered from the victim's neck and head. He confirmed that a box cutter was found in the defendant's car and pointed out that the murder weapon was never recovered.

On cross-examination, Detective Williams acknowledged that he had received a call from the defendant's brother informing him that the defendant "wanted to turn himself in." He explained that because the police were not sure whether the defendant was a witness, victim, or suspect, the initial statement to Detective Bernard was not recorded. He stated that the defendant appeared to have arrived at the police station voluntarily and was accompanied by his brother and his cousin.

Agent Chad Johnson with the Tennessee Bureau of Investigation, an expert in the fields of serology and DNA analysis, testified that DNA extracted from blood samples taken from the kitchen floor of the defendant's residence were consistent with that of the victim.

Metropolitan Nashville Police Department Officer Michael L. Baker of the Forensics and Firearms Unit testified that the bullet recovered from the desk in the bedroom where the body was found was a nine millimeter whereas a bullet recovered from the mattress was a .22 caliber, which meant that they were fired from different guns. He identified the bullets that were recovered from the body as .22 caliber, explaining that they were heavily contaminated with blood and other

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<sup>1</sup> The record, however, indicates that the detectives continued to question the defendant and elicited more information. The trial court suppressed all statements made after the defendant asserted his Fifth Amendment rights.

biological matter. He determined that based on the weight of the rounds recovered, the victim had been shot with at least two bullets. He concluded that other lead fragments, which could have been pieces of the two bullets or fragments of a third bullet, were also recovered from the victim. Because of damage from striking bone, the officer was not able to ascertain whether the .22 caliber bullets recovered from the victim were fired from the same gun as the .22 caliber bullet recovered from underneath the bed. Officer Baker confirmed that the bullet recovered from underneath the bed was not contaminated with any blood or other biological matter.

Dr. Feng Li, an assistant medical examiner for Davidson County, testified that there was no stippling found on the victim's body, indicating that the victim was shot from at least two and a half feet away. During an autopsy of the victim, he identified three likely gunshot wounds, one of which passed through the victim's left forearm, a possible indication of a defensive wound. Dr. Li determined that the other two bullets recovered in the autopsy entered through the victim's neck about one inch from each other. He found that one of the bullets traveled through the victim's mouth. The doctor explained that because the head area is "very rich in blood supply," there would have been significant blood loss as a result of the two gunshots in the victim's neck. He estimated that the victim, who had some cocaine in his system, lived for only a matter of minutes after he was shot. Dr. Li was unable to determine whether the victim was under the influence of cocaine at the time he died, confirming that the amount of cocaine in his system was at its lowest when the autopsy was performed because of its diminution over time even in a deceased body. He agreed that cocaine use could make people anxious and possibly more aggressive than normal. Dr. Li acknowledged that he could not determine whether the three wounds were caused by two or three bullets because the bullet that traveled through the victim's forearm could have also entered his neck. He was unable to determine the position of the victim when he was shot.

The defense rested without introducing any evidence.

#### I.

The defendant contends that the trial court erred by denying his motion to suppress the statement he provided to Detective Bernard. He asserts that because the statement was taken during a custodial interrogation before he was informed of his Miranda rights, it was obtained in violation of his right against self-incrimination under the Fifth Amendment. The state submits that the trial court did not err by denying the defendant's motion because the statement was neither given while in custody nor in response to interrogation.

At the suppression hearing, it was established that Detective Joe Williams was the lead investigator but that Detective Bernard and other detectives were initially involved. Because the defendant's brother was at the police station and wanted to meet with one of the detectives investigating the case, Detective Bernard made himself available to the defendant, the defendant's brother, and other members of the family. The defendant and at least some members of his family walked to the homicide offices, located in a secured area of the police station. From there, Detective Bernard, who stated that he was unaware whether the defendant was a victim, suspect, or witness,

accompanied the defendant into a sergeant's office, which was a fully enclosed office with a door. Other family members waited in the hallway outside the office.

According to Detective Bernard, the door to the sergeant's office was left open and he specifically advised the defendant that he was not under arrest. The defendant was not handcuffed, searched, or frisked. After informing the defendant that a body had been found at his residence, Detective Bernard recalled that the defendant "volunteered" that he had been in an altercation with the victim, explaining that he shot the victim in self-defense, panicked, and fled. Detective Williams entered the room as the defendant implicated himself in the shooting, so the session was ended and the defendant was led to an interview room that was equipped with audio and video recording equipment. It was established that the detectives then provided Miranda warnings to the defendant, who signed a rights waiver form. Detective Bernard confirmed that the defendant repeated his statement before requesting an attorney. He claimed that neither he nor Detective Williams asked the defendant any further questions after that but admitted that the defendant subsequently provided additional information about the location of the weapon and a car. A transcript of the session demonstrated that the defendant was further questioned about the location of the gun and the location of his car. A card key was required to enter the secured area of the police station but Detective Bernard testified that the defendant was at all times until his admission of the shooting free to leave by simply walking through two exit doors and touching a button to open a third door.

During the course of the suppression hearing, Detective Williams described the defendant as initially a "person of interest." He described his initial objective as locating the defendant. While acknowledging that the standard procedure was to record witnesses' statements, regardless of whether they are considered prime suspects, Detective Williams confirmed that the initial discussion with the defendant in the sergeant's office was not recorded.

The defendant testified at the suppression hearing that his brother, his cousin, and his cousin's wife accompanied him to the police station. He recalled being led through secured doors into a hallway, where he and his family waited, before Detective Bernard took him into the sergeant's office. He admitted that he gave a brief statement but only after Detective Bernard had asked for an explanation of the body in his residence. The defendant remembered being moved to an interview room where he signed a waiver form and provided the detectives with some basic information before asking to consult with an attorney. He testified that Detective Bernard continued to question him until another officer entered the room to end the interview. The defendant claimed that even after he was handcuffed to a chair in the hallway, Detective Bernard asked additional questions.

The defendant's brother, John Tidwell, testified at the suppression hearing that he received a call from a sister who said that the defendant should go to the police station and ask for Detective Williams. While in the hallway, Tidwell overheard a detective remark, "[O]h, you're the one we're looking for," in reference to the defendant. Tidwell confirmed that the defendant was led into an office and that the door was not closed. He stated that he understood that the defendant was free to leave until he was informed that he had been taken into custody.

The trial court denied in part the defendant's motion to suppress, finding that the defendant was not in custody and that his initial statements in the sergeant's office were not in response to an interrogation. The court pointed out that the defendant had traveled to the police station of his own accord, the door of the office remained open, his family was seated immediately outside in the hallway, and no restraint was placed on the defendant's movement. The trial court found that there were no coercive acts designed to induce the defendant to make a statement, that the defendant was aware that he was free to leave, and that his statement was voluntarily given. The court also found that the defendant made a knowing, intelligent, and voluntary waiver of his Miranda rights in the interview room. The trial court did, however, suppress that portion of the statement made after the defendant asked for the assistance of counsel.

Several well-established principles apply in the determination of whether the entire statement should have been suppressed. The Fifth Amendment to the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; see also Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that the Fifth Amendment's protection against compulsory self-incrimination is applicable to the states through the Fourteenth Amendment). Article I, section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. "Encompassed within these constitutional provisions is the right to counsel, which is applicable whenever a suspect requests that counsel be present during police-initiated custodial interrogation." State v. Saylor, 117 S.W.3d 239, 244 (Tenn. 2003). When there is an unequivocal request for an attorney, all interrogation must cease, unless the suspect himself initiates further conversation with the police. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); State v. Stephenson, 878 S.W.2d 530, 545 (Tenn. 1994).

Generally, one must affirmatively invoke these constitutional protections. An exception arises, however, when a government agent makes a custodial interrogation. Statements made during the course of a custodial police interrogation are inadmissible at trial unless the state establishes that the defendant was advised of his right to remain silent and his right to counsel and that the defendant then waived those rights. Miranda, 384 U.S. at 471-75; see also Dickerson v. United States, 530 U.S. 428, 444 (2000); Stansbury v. California, 511 U.S. 318, 322 (1994). A defendant's rights to counsel and against self-incrimination may be waived as long as the waiver is made voluntarily, knowingly, and intelligently. Miranda, 384 U.S. at 478; State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992). In order to effect a waiver, the accused must be adequately apprised of his right to remain silent and the consequence of deciding to abandon the right. Stephenson, 878 S.W.2d at 544-45. In determining whether a confession was voluntary and knowing, the totality of the circumstances must be examined. State v. Bush, 942 S.W.2d 489, 500 (Tenn. 1997). If the "greater weight" of the evidence supports the court's ruling, it will be upheld. Id. This court must conduct a de novo review of the trial court's application of law to fact. State v. Bridges, 963 S.W.2d 487 (Tenn. 1997); State v. Yeargan, 958 S.W.2d 626 (Tenn. 1997).

In Miranda, the United States Supreme Court limited its holding to a "custodial interrogation." Miranda, 384 U.S. at 478-79. The Court defined the phrase "custodial interrogation"

as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444. A person is "in custody" within the meaning of Miranda if there has been "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (citation omitted). The Court has refused to extend the holding in Miranda to non-custodial interrogations. See Oregon v. Mathiason, 429 U.S. 492 (1977) (holding that an accused's confession was admissible because there was no indication that the questioning took place in a context where his freedom to depart was restricted in any way); see also Beheler, 463 U.S. at 1124-25 (noting that the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest). In determining whether a reasonable person would consider himself or herself in custody, our supreme court considers a variety of factors, including the following:

"the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will."

State v. Walton, 41 S.W.3d 75, 82-83 (Tenn. 2001) (quoting State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996)).

The standard of review applicable to suppression issues is well established. When the trial court makes a finding of facts at the conclusion of a suppression hearing, the facts are accorded the weight of a jury verdict. Stephenson, 878 S.W.2d at 544. The trial court's findings are binding upon this court unless the evidence in the record preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); see also Stephenson, 878 S.W.2d at 544; State v. Goforth, 678 S.W.2d 477, 479 (Tenn. Crim. App. 1984). Questions of credibility of witnesses, the weight and value of the evidence, and resolution of conflicts in evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence. Odom, 928 S.W.2d at 23. Also, "appellate courts may consider evidence adduced at trial in evaluating the correctness of a pretrial ruling on a motion to suppress." State v. Henning, 975 S.W.2d 290, 297 (Tenn. 1998). This court's review of a trial court's application of law to the facts, however, is conducted under a de novo standard of review. See State v. Walton, 41 S.W.3d at 81; State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999).



In this case, the defendant voluntarily traveled to the police station at approximately 9:30 p.m. in order to speak with detectives. The testimony at the hearing and at the trial established that members of the defendant's family accompanied him to the police station and waited in the hallway while he spoke with the detectives. As indicated, the door to the sergeant's office remained open to the hallway during the defendant's exchange with Detective Bernard. There were no restraints on the defendant's movement. Testimony established that he was free to rejoin his family at any point during the interview. The record indicates that he was informed on two occasions that he was not under arrest. There was no suggestion that the detectives employed any coercive or suggestive verbal or nonverbal acts to induce the statement. The initial interview was brief, lasting no more than ten minutes. Under these circumstances, it is our view that the defendant was not in custody for purposes of Miranda.

Furthermore, once escorted to the interview room, the defendant was informed of his Miranda rights, he expressed an understanding of each of his rights, and he signed a form waiving those rights. The trial court did not, therefore, err by refusing to suppress the initial statement the defendant made in the sergeant's office or the additional, videotaped statements he made in the interview room until the point he requested an attorney.

## II.

The petitioner next contends that the trial court erred by refusing to exclude evidence that the defendant unsuccessfully pursued a romantic relationship with and expressed violent thoughts to third parties about the victim's sister because the evidence was irrelevant and otherwise inadmissible under Tennessee Rule of Evidence 404(b). The state submits that the trial court properly allowed the evidence to provide contextual background and to show motive.

Generally, the admission of evidence is a matter entrusted to the sound discretion of the trial court, and a trial court's ruling on an evidentiary matter will not be reversed absent abuse of that discretion.<sup>2</sup> State v. Robinson, 146 S.W.3d 469, 490 (Tenn. 2004) (citing State v. Dubose, 953 S.W.2d 649, 652 (Tenn. 1997)). On appeal, "[t]he abuse of discretion standard contemplates that before reversal the record must show that a judge 'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" State v. Coley, 32 S.W.3d 831, 833 (Tenn. 2000) (quoting State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999)); see State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997).

For evidence to be admissible, it must be relevant. Tenn. R. Evid. 402. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." Tenn. R. Evid. 401.

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<sup>2</sup>Donald F. Paine, distinguished adjunct professor at the University of Tennessee College of Law and reporter to the Tennessee Supreme Court Advisory Commission on Rules of Practice and Procedure, has criticized the "sound discretion of the trial court" standard, arguing that the admission of evidence is strictly governed by the Tennessee Rules of Evidence. Donald F. Paine, Evidentiary Nonsense, Tenn. Bar Journal, June 2005, at 15.

Tennessee Rule of Evidence 404(b) prohibits the admission of "other crimes, wrongs, or acts" of the defendant when admitted only to show the defendant's propensity to commit the crime charged. See Tenn. R. Evid. 404(b). Evidence "may, however, be admissible for other purposes." Id. In State v. Gilliland, 22 S.W.3d 266, 272 (Tenn. 2000), our supreme court held that "contextual background evidence, which contains proof of other crimes, wrongs, or acts, may be offered as an 'other purpose' under [Tennessee Rule of Evidence] 404(b) when exclusion of that evidence would create a chronological or conceptual void in the presentation of the case and that void would likely result in significant jury confusion concerning the material issues or evidence in the case." Also, the probative value of the evidence must not be outweighed by the danger of unfair prejudice. State v. Leach, 148 S.W.3d 42, 58 (Tenn. 2004); Gilliland, 22 S.W.3d at 272. In explaining the need for contextual background evidence, our high court stated, "Events do not occur in a vacuum, and in many cases, knowledge of the events surrounding the commission of the crime may be necessary for the jury to 'realistically evaluate the evidence.'" Id. The court cautioned, however, that background evidence is not always admissible, "especially when the evidence would not serve to substantially assist the jury in its understanding of the issues or place the material evidence in its proper context." Id. A trial court must conduct a jury-out hearing to determine whether evidence is admissible to show contextual background. Leach, 148 S.W.3d at 57.

Tennessee Code Annotated section 39-11-611(a) provides as follows:

A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.

Tenn. Code Ann. § 39-11-611(a) (2003). Introduction of evidence supporting self-defense (which was a part of the defendant's statement to the police in this case) places the burden on the state to prove beyond a reasonable doubt that the defendant did not act in self-defense. Tenn. Code Ann. § 39-11-201(a)(3) (2003); State v. Belser, 945 S.W.2d 776, 782 (Tenn. Crim. App. 1996); Tennessee Pattern Jury Instructions, Criminal 40.06. One way to prove that the defendant did not act in self-defense is to offer evidence that he provoked the other individual's use or attempted use of unlawful force. See Tenn. Code Ann. § 39-11-611(d). Whether a defendant acted in self-defense is a factual determination to be made by the jury. State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997).

Here, the trial court found that the circumstances surrounding the defendant's relationship with the victim's sister, including the uncomplimentary comments the defendant made about her, were admissible as "contextual background evidence." The trial court described the testimony as placing "the circumstances of the case and the relationships of the parties involved into a logical

framework. . . . [and] the absence of the testimony would create a conceptual void in the evidence that would give rise to a substantial likelihood of juror confusion." The trial court also concluded that the probative value of the evidence was not outweighed by the danger of unfair prejudice based in part on its opinion that the evidence indeed did not show criminal propensity.

The only defense was that of self-defense. The defendant claimed that prior to the killing, the victim had made statements and acted in such a way that led him to fear for his safety. He claimed that when the victim assaulted him with a box cutter, he shot in self-defense. The state sought to prove otherwise. See Tenn. Code Ann. § 39-11-201(a)(3); Belser, 945 S.W.2d at 782. The relationship between the defendant and the victim appears to have been partially defined by their respective relationships with Ms. Harriston. From the evidence offered at trial, the victim's sister appears to have been the nexus between the two men. The trial court instructed the jury to consider the evidence "only as it serves to establish the relationship between the defendant and [the victim], and for no other purpose." In that regard, it must be presumed that the jury followed the instructions of the trial court. State v. Butler, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994); Klaver v. State, 503 S.W.2d 946 (Tenn. Crim. App. 1973).

The state contended that the absence of evidence as to the nature of the defendant's relationship with the victim would create a void in the presentation of the state's case. The way the state chose to support its theory that the defendant did not act in self-defense was to offer evidence of his threats made in the victim's presence toward Ms. Harriston. The jury could have inferred from the evidence presented that the defendant provoked the victim to attack him with the box cutter, mitigating the effectiveness of a self-defense claim. See Tenn. Code Ann. § 39-11-611(d) ("The threat or use of force against another is not justified if the person provoked the other individual's use or attempted use of unlawful force . . . ."). In our view, a contextual understanding of the relationships between the defendant, the victim, and the victim's sister substantially assisted the jury and was relevant. It is our assessment that the probative value of this evidence outweighs the danger of any unfair prejudice. Further, even if the admission of the evidence was error, it was harmless in light of the other evidence against the defendant. Tenn. R. App. P. 36(b). That the defendant had made inflammatory remarks offensive to the victim was not altogether contradictory to the theory of self-defense.

### III.

The defendant next asserts that the evidence was insufficient to support his conviction for second degree murder. On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Because a verdict of guilt against a defendant removes the presumption of innocence

and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

Second degree murder is a "knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1) (2003). In this case, the victim's body was found in the defendant's residence. The defendant confessed that he fired the fatal shot but contended that the victim threatened him with a box cutter. No box cutter was found in the residence. The jury rejected the defendant's claim of self-defense, which was its prerogative. The verdict resolved the conflicts in the testimony in favor of the state. See State v. Summerall, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995).

Accordingly, the judgment of the trial court is affirmed.

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GARY R. WADE, PRESIDING JUDGE